National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 7, 1994

TO: Ralph R. Tremain, Regional Director, Region 14

FROM: Robert E. Allen, Associate General Counsel, Division of Advice

SUBJECT: TNT Holland Motor Express Case 14-CA-22856 and Teamsters Local Union No. 600 (TNT Holland Motor Express), Case 14-CB-8244

524-5096-5000, 524-5096-5087

These Section 8(a)(3) and 8(b)(1)(A) and (2) cases were submitted for advice as to the legality of a contractual casual employee hiring procedure that gives preference to laid-off employees of me-too signatory employers as well as to laid-off employees of members of the multiemployer bargaining association which had negotiated the contract.

FACTS

The Employer is engaged in the interstate trucking business, operating terminals throughout the Midwest. Historically, and in 1991, it assigned its bargaining rights to Trucking Management Inc. (TMI), one of two multiemployer bargaining associations that bargained on behalf of certain employers in the trucking industry with the International Teamsters Union. TMI was party to the most recent contract, which was in effect from April 1, 1991 through March 31, 1994.

The National Master Freight Agreement (NMFA) contains the following definitions of covered employers and the bargaining unit:

Article 1. Parties to the Agreement Section 1. Employers Covered

The Employer consists of Associations, members of Associations who have given authorization to the Associations to represent them in the negotiation and/or execution of this Agreement and Supplemental Agreements, and individual Employers who become signator to this Agreement and Supplemental Agreements as hereinafter set forth....

Article 2. Scope of Agreement Section 4. Single Bargaining Unit

...Accordingly, the Associations and Employers, parties to this Agreement, acknowledge that they constitute a single national multi-employer collective bargaining unit composed of the Associations named hereinafter and those Employers authorizing such associations to represent them for the purpose of collective bargaining, and solely to the extent of such authorization, and such other individual employers which have, or may, become parties to this Agreement.

The contract also provides that "[a] casual employee is an individual who is not on the regular seniority list and who is not serving a probationary period." Finally, in Article 3, Section 2(7), the contract states that "[t]he Employer agrees to give first opportunity for work as a casual employee to qualified laid-off employees from other employers signatory to the NMFA" and that "[t]he Local Union will furnish to the Employer a list of the names, addresses, phone numbers and the jobs such employees are qualified to perform." In addition to the NMFA, the Central Conference of Teamsters, covering 13 states, executed a separate Memorandum of Understanding with the two multiemployer associations that had negotiated the NMFA, TMI and Regional Carriers, Inc. (RCI), providing that each Local Union would "provide each Signator Carrier within its jurisdiction with a list of casual employees who meet certain criteria (employees who are on layoff from a Signator Carrier or who are laid-off as a result of a Signator Carrier going out of business)."

It appears that the Memorandum of Understanding also provides that each employer will select a number of casual employees

from the Local Union's casual preferential hiring list equal to 5 percent of its permanent employee complement and those employees will comprise the employer's casual preferential hiring list. Thus, if an employer employs 60 permanent employees, it will select three employees from the Local Union's preferential hiring list to place on the employer's casual preferential hiring list. When an employer needs casual employees, it will first call the employees on its casual preferential hiring list and only if it needs more casual employees will it call employees from the Local Union's bigger casual preferential hiring list. Then if the Local Union's bigger list cannot satisfy the employer's demands, the employer may hire casuals off the street. An employer obtains permanent employees by "promoting" casual employees to the vacancies and then replacing those "promoted" casual employees with other casual employees by means of the procedure set forth above.

The Local Union states that its casual preferential hiring list for the trucking industry, in accordance with the contract language, consists of employees who have been laid off by contract signatories or who were laid off as a result of a signatory carrier going out of business. The Local Union further states that in placing laid-off employees on the casual preferential hiring list, it includes employees of employers which bargained directly with the International Union or assigned their bargaining rights to either TMI or RCI and those which executed the contract as me-too signatories. The referral list does not identify listed employees' former employers or whether those employers were members of one of the two multiemployer associations or me-too contract signatories.

In early November 1993, Charging Party Ronald Dorlac applied directly to the Employer for a job. On November 17, 1993, Dorlac was hired as a casual driver/dockhand by the Employer on an "as needed" basis. On November 18, 1993, the Local Union steward advised him that he had to join the Local Union and could not return to work until he had done so. He went to the Local Union hall, assured the Local Union representative that he had a job with the Employer and joined the Local Union. [(1)] On November 29, 1993, the Local Union told Dorlac that he was not eligible to work as a casual for the Employer as he was not on the casual preferential hiring list. In January 1994, after being informed that there had been a change in Local Union officers, Dorlac returned to the Local Union's offices and spoke with a new officer about returning to work as a casual for the Employer. The Local Union officer contacted the Employer and referred Dorlac back to the job where he worked for a few days. On January 24, 1994, Dorlac was told that the Local Union had erred in placing him on its preferential hiring list as he did not meet the criteria for placement on the list, having never been laid off by an employer who was signatory to the NMFA. The Local Union states that the new officer did not know about the casual employee criteria and that after the discovery of the error by an experienced Local Union official, Dorlac was immediately notified of the error. The Local Union admits that it notified the Employer in November and January that Dorlac was not eligible to be used as a casual employee and that the notification was made pursuant to the contract provisions concerning the preferential hiring list.

ACTION

We conclude that complaints should issue, absent settlement.

The Board will find unlawful the maintenance of a contractual referral or hiring preference that is unlawful on its face. [(2)] That theory applies to hiring hall and job referral rules that are based upon prior work with a union signatory rather than upon prior employment in the bargaining unit.

In IATSE Local 659 (MPO-TV of California), 197 NLRB 1187 (1972), the contract between the multiemployer association and the union provided for an Industry Experience Roster, which conferred a preference for referrals from the union's hiring hall. The preference was available not only to employees who had previously worked for the employer-members of the multiemployer unit, but also to employees who had worked for employers who were parties to me-too contracts in single employer units. Out-of work employees with similar nonunit work experience were not permitted to be on the Industry Experience Roster if their former employers had not signed the union's contract. The result was, the Board said, that "[n]o matter what qualifications an employee brings with him, if he has not in the past been represented by [the union] he cannot gain employment with any employer who is party to a collective-bargaining agreement with [the union]." Ibid. at 1190. Similarly, in New York Typographical Union No. 6 (Royal Composing Room), 242 NLRB 378 (1979), enf. denied in relevant part, 632 F.2d 171, 105 LRRM 2529 (2d Cir. 1980), the Board found that the preference in recall rights given laid-off employees in the multiemployer unit was unlawful because the preference was granted to employees who worked for signatories without regard to whether the signatories were members of the multiemployer unit. [(3)] Thus, MPO-TV and Royal

Composing Room both relied on the crucial fact that the unions granted seniority for the purposes of employment not only to unit employees, but also to employees who had work experience with me-too signatories which were not a part of the multiemployer unit. From this fact the Board inferred that the unions based seniority upon employment by union signatories in general and thus discriminated against employees whose experience was gained through employment by nonsignatories and who had thereby exercised their statutory right to be unrepresented. The Board also concluded that the types of preferences described above impaired the ability of new employees to obtain initial employment with employers represented by these unions.

Thus, the key question in determining the legality of a preferential hiring list, such as the one in these cases, is whether the me-too signatories whose laid-off employees have such a hiring preference are part of the multiemployer unit. The essential element of a multiemployer bargaining relationship is a common "intention to be bound in collective bargaining by group rather than by individual action." Kroger Co., 148 NLRB 469, 473 (1964). Thus, as the Board has noted, "a multiemployer unit, unlike other types of bargaining units, is consensual in nature." Ruan Transport Corp., 234 NLRB 241, 242 (1978).(4) The necessary consent that distinguishes multiemployer bargaining may be demonstrated by "a controlling history of collective bargaining on such a basis, or on an unequivocal agreement of the parties to bind themselves to a course of group bargaining in the future." Electric Theatre, 156 NLRB 1351, 1352 (1966).

However, a party does not become part of a multiemployer unit if it "merely adopts a collective-bargaining agreement." Ruan Transport, supra at 242. Indeed, a party will not be considered part of a multiemployer unit even though it consented to contract language by which it agreed in advance to be bound by the outcome of subsequent multiemployer bargaining negotiations. Royal Composing Room, supra.(5) The Board's general rule is that "an employer does not become part of a multiemployer bargaining group unless it participates (either personally or by an authorized representative) in joint bargaining with the Union." Ruan Transport Corp. supra at 242.

In the instant cases, the me-too signatories have not expressly delegated bargaining authority to either TMI or RCI. Nor is there evidence as to whether the me-too signatories directly participated in contract negotiations. Thus, there is now no noncontractual evidence that the me-too signatories intended to become part of the multiemployer unit. Compare Bel-Window, 240 NLRB 1315 (1979), affirmed 109 LRRM 3296 (9th Cir. 1982), where the Board found a multiemployer bargaining unit existed because after the union sent identical contract reopeners and initial contract proposals to several employers, those employers caucused and jointly formulated a counterproposal which they discussed at contract negotiations at which each employer was represented. Employees of all the employers voted as a unit on any contract proposal. After contract ratification, the employers signed separate agreements that were identical except for the employers' names. Relying on such evidence, the Board found that each employer intended to be bound by the results of group negotiations.(6)

We next noted that the NMFA, Article 2, Section 4 states:

...the Associations and Employers, parties to this Agreement, acknowledge that they constitute a single national multiemployer collective bargaining unit composed of the Associations named hereinafter and those Employers authorizing such associations to represent them for the purpose of collective bargaining and solely to the extent of such authorization, and such other individual employers which have, or may, become parties to this Agreement. (emphasis supplied)

However, under Board law, this contractual language is not determinative of whether the contract covers a single bargaining unit that includes the me-too signatories. Ruan Transport, supra, is a Section 8(a)(5) case concerning an employer's refusal to be bound by a multiemployer unit contract. The Administrative Law Judge found contract language similar to the language quoted above(7) to be ambiguous and therefore examined the parties' conduct. He concluded that the employer was not in the multiemployer unit. The Board did not pass on whether the "one bargaining unit" provision was ambiguous. Instead, the Board stated:

[a]ssuming arguendo that the provision was clearly written and unambiguous, we find that such a bare covenant by the Respondent by which it agreed to be a part of a multiemployer bargaining group does not itself suffice to clearly demonstrate that the Respondent delegated authority to the [multiemployer bargaining representative] to represent the Respondent in future negotiations with the Union. The most that can be said for the "one bargaining unit" provision is that it implicitly authorized

the [multiemployer bargaining representative] to represent [the employer] in the [negotiations for the agreement]. However, we find that something in addition to a mere implied delegation of authority is needed in order to constitute clear evidence of an unequivocal intent on the part of an employer to be bound by group bargaining. We would require, for example, some conduct on the part of the employer which indicates that it actually pursued a group course of action with regard to labor relations. Id. at 242 (emphasis in original; footnote omitted).

The Board then found that the parties' conduct was inconsistent with an intention on the part of the employer to participate in a multiemployer bargaining relationship with the union. Therefore, it found no violation.[(8)] Accordingly, in the present cases, the me-too signatories cannot be regarded as part of the multiemployer unit merely because the collective-bargaining agreement contains the "one bargaining unit" provision. Moreover, as noted above, there is no evidence as to whether the signatories in some way other than by express delegation of bargaining authority to TMI or RCI indicated that they intended to be part of the TMI-RCI multiemployer unit.[(9)]

Therefore, in the absence of evidence indicating that the me-too signatories and the members of the multiemployer association constitute a single bargaining unit, the contract recall preference available to laid-off employees of me-too signatories is unlawful under the analyses set forth in MPO, supra, and Royal Composing Room, supra.

We find distinguishable Teamsters Local 896 (Anheuser-Busch, Inc.), 296 NLRB 1025 (1989), where the Board found lawful a contractual provision that allowed employees of other employers who had contracts with the union in different bargaining units to bump temporary and new employees of the employer. The contract gave seniority credit for employment in the employer's bargaining unit that included separate classifications for permanent brewers, permanent bottlers, permanent storeroom attendants, temporary bottlers, temporary storeroom attendants, and new employees. Permanent and temporary status depended upon length of employment under the contract "in one classification in one calendar year as an employee of the brewing industry in this State (California)." Further, although plant seniority usually controlled layoffs, Section 4(b) of the contract provided as an exception to plant seniority that a permanent employee who had been last laid off by an "Individual Employer" could "bump" a temporary or new employee with the lowest plant seniority at another "Individual Employer" in the local area. Under this provision, laid-off employees of Miller and Stroh, other California breweries represented by the union, bumped the least senior temporary and/or new employees of Anheuser-Busch.

In finding this bumping preference lawful, the Board found that it was justified in the unusual situation there because the union-represented breweries in the state had previously been part of a single multiemployer unit and were voluntarily continuing the same relationship by this and other "seniority-based contractual vestiges" of the prior multiemployer unit[(10)]. The Board also found the bumping preference there differed from those preferences found unlawful in cases such as MPO and Royal Composing Room because agreements in those cases accorded applicants preference in employment based solely on prior employment with employers who had contracts with a union, even if those employers were not part of the unit, and therefore discriminated on the basis of nonunion status. In Anheuser-Busch, on the other hand, neither the contract provision nor its application indicated that employees or applicants would be discriminated against based on nonunion or even nonunit status. Anheuser-Busch's new and temporary employees who were bumped were members of the union-represented unit. The Board further stated that it could not be presumed from the contractual language that the union would act unlawfully by refusing to dispatch as a permanent employee "bump-in" an individual claiming credit for employment with a nonunion California brewery, such as Anchor Steam. The Board stressed that the bumping provision would not, unlike the language in MPO, prevent any job applicant except one who had had prior employment with a union-represented employer from obtaining initial employment with Anheuser-Busch. The provision in no other way relied exclusively on union representation. The Board then noted that the provision was arguably "skill based." Finally, the Board noted that an employee cannot avoid or secure the bumping right merely by joining the union or working for employers who have contracts with the union.[(11)]

Unlike Anheuser-Busch, the present cases do not define the preference in terms of rights of employees of union-represented employers over rights of employees of other union-represented employers. Instead the preference here grants rights to employees of signatories to Union contracts over those who do not have that experience. The preference to those who worked for Union signatories is thus clearly provided in the contract. Additionally, Dorlac was adversely affected by the hiring preference.

For all of the above reasons, Sections 8(a)(3) and 8(b)(1)(A) and (2) complaints are warranted, absent settlement, because it appears that the Employer and the Union maintained and enforced a contract clause that gave hiring preference to laid-off employees of me-too contract signatories who were not part of a single multiemployer bargaining unit.[(12)]

R.E.A.

---

[1] The Region concluded that further proceedings are warranted with respect to the Local Union's conduct in requiring Dorlac to tender dues and initiation fees after his second day of employment. Thus, that issue has not been submitted to Advice.

[2] See, e.g., Seafarers Intl. Union (American Barge Lines), 244 NLRB 641 (1979).

[3]The reviewing court in Royal Composing Room denied enforcement because, inter alia, it found that the me-too signatories had expressed an unequivocal intention to be part of the multiemployer unit by binding themselves in advance of negotiations to sign the resulting agreement. The court further found that the other parties had consented to the me-too signatories' joining the multiemployer unit and that a number of contract terms covered all employees whether they worked for an Association member or a me-too signatory, and that those contract benefits were portable.

[4] See also Van Eerden Co., Inc., 154 NLRB 496, 499 (1965).

[5] See also Painters District Council 51 (Manganaro Corp.), 299 NLRB 618, 620 (1990).

[6] See also Southern California Pipe Trades Council (Plumbing Industry), 292 NLRB 270 (1989).

[7] See 234 NLRB at 241:

The employees covered under this Agreement shall constitute one bargaining unit. Accordingly, the Midwest Employers Labor Advisory Council, Inc., and the Employers who are parties to this Agreement acknowledge that they are part of a multiemployer collective-bargaining unit comprised of the Midwest Employers Labor Advisory Council, Inc., and those of their members who have or will certify the Council to represent them for the purpose of collective bargaining, and only to the extent of such authorization; and also such other individual employers who have or may singly become parties to this agreement.

[8] See also Schaetzel Trucking, Inc., 250 NLRB 321, 323 (1980).

[9] See, e.g., Schaetzel Trucking, supra at 323 (no evidence that employer had participated in the multiemployer association union negotiations or was listed as a party on copies of collective-bargaining agreement). See also Kuykendall Painting Co., 308 NLRB 177 (1992) (no intent to be part of multiemployer unit found where contract did not indicate such an intent, union demanded recognition from employer based upon its majority status among employer's employees, and union asked employer if it was designating multiemployer association as its bargaining agent). See also West Lawrence Care Center, 305 NLRB 212 (1991).

[10] Anheuser-Busch, 296 NLRB at 1028.

[11] See also Teamsters Local 896 (Miller Brewing Co.), 296 NLRB 1030 (1989) (same).

**[12] [*FOIA Exemption 5*

].**